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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KAELEEN COSTA, Plaintiff and Respondent, v. JOYCE SNEED, Defendant and Appellant.	A121633 (Alameda County Super. Ct. No. RG07347237)

Plaintiff Kaeleen Costa sued her former landlord, defendant Joyce Sneed, for violating Oakland's Just Cause for Eviction Ordinance. On appeal from an order denying Sneed's special motion to strike the complaint as a strategic lawsuit against public participation (SLAPP) pursuant to Code of Civil Procedure[1] section 425.16—commonly referred to as the anti-SLAPP statute—Sneed contends the trial court erred in concluding the conduct giving rise to Costa's complaint was not protected petitioning or free speech activity. We affirm the order denying Sneed's anti-SLAPP motion.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1990, Costa agreed to rent a residence in Oakland, California from Sneed. The tenancy was on a month-to-month basis with the monthly rent initially set at $700.

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Sixteen years later, in November 2006, Costa was still a tenant of Sneed's when she learned that Sneed was considering a sale of the property. Sneed told Costa her tenancy would be terminated by a sale of the premises and proposed that Costa contact the new owner to negotiate a new tenancy. In December 2006, George Robinson, a real estate broker purporting to act on behalf of Sneed, told Costa the premises had been sold to new owners. Robinson advised Costa that the new owners would rent the premises to her at a monthly rent of $2,500, over three times what Costa was then paying to Sneed.

In a letter dated January 3, 2007, Sneed informed Costa that she had received and accepted an offer on the premises leased by Costa, which was "under new ownership." Sneed directed Costa to mail the January rent payment to her, and that "[a]fter [Costa's] move," Sneed would be responsible for any refund of Costa's security deposit following a walk-through of the property. Sneed told Costa to contact the realtor, Robinson, if she had any questions. She also informed Costa that she believed the new owners would be renting out the property, if Costa was interested in remaining.

Costa received a certified letter dated January 3, 2007, from the couple who claimed to be the new owners of the property, James Patterson and La Sandra Ivy-Patterson (the Pattersons). The Pattersons stated it was their intention to rent the property they had purchased from Sneed. They were open to discussing the possibility that Costa continue to rent the property. The letter concluded: "If you have no interest in discussing the possibility of remaining in the property, we ask that the property be vacant on or before February 5, 2007. This will give you 30 days to acquire a new residence. Therefore, this letter shall serve as a 30-day notice, effective January 5, 2007." On January 10, 2007, Costa received a call from the realtor, Robinson, advising her he was holding an open house for prospective renters on January 13.

In a letter dated January 15, 2007, Costa responded to the Pattersons' letter at the address provided by them, indicating she was interested in continuing to rent the property. Costa's letter was returned by the post office as undeliverable.

Costa attempted to confirm the sale of the property she was renting but learned the county recorder had no record of the property being sold. On January 23, 2007, she

wrote Sneed to "ask what is really going on," pointing out that the address provided to her by the Pattersons was invalid and that county records indicated the property had not been sold.

Costa subsequently learned that Sneed executed a grant deed for the premises on January 22, 2007, in her capacity as trustee for the Joyce M. Sneed Trust. The grant deed describes the transfer as a gift from the Joyce M. Sneed Trust to Sneed individually and the Pattersons, with Sneed continuing to hold an undivided one-third interest in the property as a tenant in common. Following the transfer, the Pattersons each held an undivided one-third interest in the property as tenants in common.

In late January 2007, Costa received a second letter from the Pattersons. The Pattersons indicated they had received no response from Costa expressing interest in remaining at the property. As a consequence, the Pattersons informed Costa the original 30-day notice would remain in effect. The letter also indicated the Pattersons would be occupying the property themselves and asked that it be vacant on or before February 5, 2007. The Pattersons informed Costa that if they failed to receive a response on or before February 1, 2007, they would "begin occupying the property on February 6, 2007."

Costa vacated the premises on February 5, 2007. In a letter to the Pattersons dated February 1, 2007, Costa stated she was leaving the property under duress.

On September 20, 2007, Costa filed suit against Sneed, the Pattersons, Robinson, and Robinson's real estate brokerage for (1) violation of Oakland's Just Cause for Eviction Ordinance, (2) violation of Business and Professions Code section 17200, and (3) wrongful eviction. In the complaint, Costa alleges Sneed and the other defendants violated Oakland's Just Cause for Eviction Ordinance by "fraudulently advising plaintiff that her tenancy had been terminated by the sale of the premises, demanding a rent increase not authorized by the ordinance, failing to comply with the notice and ownership requirements of the ordinance, misrepresenting the capacity of the individuals endeavoring to evict, and asserting an intention to occupy the unit with an ulterior motive and in the absence of a good faith and honest intent to occupy the residence as their principal residence." According to the complaint, the defendants re-rented the premises

to new tenants at a rent of $2,500 per month immediately after Costa vacated the premises.

Sneed filed a special motion to strike the complaint pursuant to the anti-SLAPP statute. (§ 425.16.) In her motion, Sneed contended the act of serving a 30-day notice on Costa was a protected activity under the anti-SLAPP statute. She further argued Costa could not establish a probability of prevailing on the merits, contending the litigation privilege is an absolute defense to a claim premised on an eviction notice when litigation was contemplated in good faith and was under serious consideration. Notably, Sneed offered no declarations or other evidence in support of her motion.[2] Instead, the only "evidence" supporting the motion was an unauthenticated copy of the parties' 1990 rental agreement, a document already attached as an exhibit to the complaint.

In opposition to the special motion to strike, Costa filed three declarations along with a request for judicial notice. The first declaration was signed by Costa herself, described the course of dealings among the parties, and authenticated the correspondence relating to the termination of Costa's tenancy. The second declaration was signed by a paralegal employed by Costa's attorney, who described visiting the premises formerly leased by Costa on September 9, 2007, to determine if the Pattersons were living there. The paralegal encountered several young men who claimed to rent the premises from Mr. Patterson, who they said lived elsewhere. The third declarant worked in the neighborhood near the premises formerly leased by Costa. He claimed to have a great deal of contact with "five young individuals" who identified themselves as the tenants and who moved into the premises in February 2007. According to the declarant, the tenants appeared to have moved out several months before the date of his declaration in February 2008, and he had observed an elderly African-American woman coming and going from the premises more recently.

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[2] In her trial court motion and in her appellate briefs, Sneed makes a number of factual assertions about the parties' course of dealings. Because the record of Sneed's anti-SLAPP motion contains no evidentiary support for these assertions, we shall disregard them.

Costa's judicial notice request asked that the court take judicial notice of five documents comprising records of property transactions and Department of Real Estate licensing records. One such document is the grant deed for the subject premises reflecting the transfer of ownership on January 22, 2007. The grant deed bears a notary's seal, the county seal, and reflects that it is an official record of Alameda County. Two of the documents submitted with the judicial notice request comprise printouts from LexisNexis reflecting information on property transfers between Sneed and the Pattersons. Among other things, these printouts describe the transfer of the subject premises as an "intra-family transaction" and reflect the sale of a $950,000 property in Brentwood by the Pattersons and Monique Robinson-Smith to Sneed in 2006. Two of the documents for which judicial notice was requested appear to be printouts of licensing information from the Department of Real Estate website. These printouts reflect that James Patterson was a licensed real estate salesperson employed by Robinson, whose main office happened to be at the property the Pattersons and Monique Robinson-Smith sold to Sneed in 2006. Taken together, the documents submitted with the judicial notice request reveal a series of connections and relationships among the defendants extending well beyond the transfer of the premises at issue in this appeal.

Sneed filed a brief in reply but again failed to offer any evidence in support of her anti-SLAPP motion or in response to the evidence offered by Costa. Instead, Sneed filed objections to Costa's judicial notice request, claiming the proffered documents lacked foundation, were not certified copies, and were not properly authenticated. Sneed did not object to the declarations offered by Costa.

In a minute order dated February 27, 2008, the trial court denied Sneed's anti-SLAPP motion. The court reasoned that Sneed "failed to show that her conduct is shielded by the litigation privilege set forth in Civil Code § 47(b)." Among other things, the court concluded that Sneed failed to show that she seriously and in good faith contemplated litigation against Costa. The court concluded: "Since Defendant Sneed failed to make a prima facie showing that Plaintiff's Complaint arises from Defendant's

constitutionally protected free speech or petition activity, the Court declines to determine whether Plaintiff has established a probability of success."

Following the denial of her motion, Sneed filed an answer to the complaint on March 26, 2008. On April 3, 2008, she filed a renewed special motion to strike pursuant to section 425.16. As justification for renewing the motion, she claimed there was new case law supporting a renewed application. Costa opposed the renewed motion, arguing that the new case cited by Sneed was consistent with prior precedent and did not justify renewing the motion. In the reply papers filed in support of her renewed special motion to strike, Sneed for the first time filed a declaration supporting the anti-SLAPP motion.

In a minute order dated April 30, 2008, the court denied Sneed's renewed anti-SLAPP motion. On May 13, 2008, Sneed filed a notice of appeal in which she identified the April 2008 order denying her renewed special motion to strike as the subject of her appeal.

While the appeal was pending in this court, Costa moved to dismiss the appeal on the ground it was taken from a non-appealable order. (See *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 968-969 [order denying motion for reconsideration not appealable].) In response to the motion to dismiss, Sneed acknowledged that the denial of a renewed special motion to strike is not an appealable order and sought to correct her notice of appeal to reflect that her appeal is from the February 27, 2008, order denying her initial special motion to strike.[3]

This court denied Costa's motion to dismiss and, at Sneed's request, construed the notice of appeal to specify that the appeal is taken *only* from the February 2008 order denying the original special motion to strike. Accordingly, our review is limited to the

[3] Because the parties were not served with a file-stamped copy of the original order or a document entitled "Notice of Entry" of that order, the time within which to appeal the order was 180 days rather than 60 days. (Cal. Rules of Court, rule 8.104(a).) Thus, the notice of appeal filed May 13, 2008, was a timely appeal from the order dated February 27, 2008.

record that was before the court at the time it denied Sneed's original special motion to strike. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

DISCUSSION

On appeal, Sneed contends the trial court erred in ruling that the complaint does not arise from protected petitioning activity. Specifically, she asserts the 30-day notice served on Costa was protected as a legal prerequisite to an unlawful detainer action. She also claims Costa cannot satisfy her burden of demonstrating a probability of prevailing on the merits, asserting that the litigation privilege acts as a complete defense to the claims against her. As set forth below, we conclude the causes of action in Costa's complaint do not arise from protected speech or petitioning activities.

1. *General Principles*

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16[4]—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

A court's consideration of an anti-SLAPP motion involves a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in

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[4] Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

In order to establish a probability of prevailing on the claim, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) "Thus, plaintiffs' burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.)

We review the trial court's decision to grant or deny an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) We independently review both the relevant issues: whether the complaint arises from protected activity and whether the plaintiff has demonstrated a probability of prevailing on the merits. (*Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 946.) In doing so, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) " 'However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citation.]" (*Flatley v. Mauro, supra,* at p. 326.)

2. *Protected Activity*

In analyzing a defendant's burden under the first prong of the anti-SLAPP analysis, "the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Id.* at p. 92.)

"The prosecution of an unlawful detainer action indisputably is protected activity within the meaning of section 425.16. [Citations.] 'The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.' [Citations.]" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 (*Birkner*).)

In this case, Sneed did not file an unlawful detainer action. Instead, she sent Costa a letter informing her the property had been sold. Although the letter did not expressly state the tenancy was terminated, the plain implication of the letter was that Costa's tenancy was terminated in that it referred to a return of Costa's security deposit "[a]fter [her] move." In addition, the Pattersons sent Costa a letter identifying themselves as the new owners and notifying her that the letter constituted a "30-day notice" to terminate. Costa vacated the premises under duress before any unlawful detainer action was filed.

As a general matter, "[t]erminating a tenancy or removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech." (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 161 (*Marlin*).) Nevertheless, a notice terminating a tenancy qualifies as protected speech or petitioning activity if it is a "legal prerequisite for bringing an unlawful detainer action," in which case the notice constitutes "activity in furtherance of the constitutionally protected right to petition. [Citation.]" (*Birkner, supra,* 156 Cal.App.4th at p. 282.) Here, no one disputes that service of a termination notice was legally required before Sneed or the Pattersons could file an unlawful detainer action against Costa. (See §§ 1161, subd. (1), 1162; Civ. Code, § 1946; Oakland Municipal Code (OMC) § 8.22.360(B); *Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113.)

Our conclusion that a legally required termination notice constitutes protected activity under the anti-SLAPP statute does not end the inquiry under the first prong of the anti-SLAPP analysis. Among other things, Costa points out that it was the Pattersons, not Sneed, who served the 30-day notice. Costa argues that Sneed should not be able to invoke the anti-SLAPP statute by relying on protected activity undertaken by third parties. We can easily dispense with this argument. As reflected in Costa's complaint and in the grant deed contained in the record, Sneed remained a co-owner of the property

along with the Pattersons after the transfer from the Joyce M. Sneed Trust. There is no requirement that every person or entity holding an ownership interest in property must each serve 30-day notices to terminate upon a tenant. (Cf. OMC §§ 8.22.340 ["landlord" defined to include owner of record holding interest in property equal to or greater than 33 percent], 8.22.360(B) [specifying that a landlord may serve eviction notice].) A 30-day notice to terminate is served on behalf of all the owners of a property, regardless of which co-owner actually serves the notice. In this case, even though Sneed did not serve the 30-day notice, it constitutes protected activity undertaken on her behalf.

Costa further argues that Sneed failed to satisfy her burden under the first prong of the anti-SLAPP analysis for the following reasons: (1) the letter denominated a "30-day notice" was legally defective and thus should not be considered activity in furtherance of the right to petition; (2) the defendants' conduct was illegal as a matter of law and is not entitled to protection as free speech or petitioning activity; and (3) the causes of action in the complaint do not arise from service of the 30-day notice and thus do not seek to chill the exercise of constitutional rights. Because each of these issues is potentially dispositive, we address them in turn.

a. *Legally Defective Termination Notice*

In *Birkner*, *supra*, 156 Cal.App.4th at p. 282, a panel of this court held that service of a termination notice is a protected activity in furtherance of the right to petition if the notice is a legal prerequisite to the filing of an unlawful detainer action. Costa interprets this holding to mean that a termination notice must be legally valid in order to qualify as protected activity. Under her interpretation, a legally defective termination notice would not constitute protected activity because it is not a valid, legal prerequisite to a lawsuit. Costa is mistaken.

At the outset, we should clarify that we agree with Costa that the termination notice served on her is legally defective. Under state law, in order for a termination notice to be valid it must be unequivocal. (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2009) ¶ 7:215, p. 7:48.10.) Thus, a notice is invalid if it both demands possession and allows the tenant to remain in possession if certain

conditions are satisfied. (*Turney v. Collins* (1941) 48 Cal.App.2d 381, 392.) The notice served on Costa is invalid on its face because it is equivocal. Costa was told to vacate the property *only* if she had no interest in discussing the possibility of remaining on the property. The equivocal nature of the notice was confirmed by a follow-up letter in which the Pattersons informed Costa they had not heard from her concerning her interest in remaining on the property. It was only then that the Pattersons expressed an unequivocal intent to evict Costa.

The termination notice is also invalid because it required Costa to vacate the premises in 30 instead of 60 days. Under state law in effect at the time the notice was served, a landlord was required to give 60 days' notice of termination to a tenant who had resided in the dwelling for more than one year, except in certain cases in which a bona fide purchaser intends to reside in the dwelling for at least one year. (Civ. Code, § 1946.1, subds. (b), (c) & (d).) In this case, Costa had resided at the property for longer than one year, and the notice indicated the Pattersons' intent to rent the premises rather than reside there.

The notice is also invalid under Oakland's Just Cause for Eviction Ordinance (OMC § 8.22.300 et seq.). Among other things, the notice fails to state a valid ground for recovering possession under the ordinance and fails to contain certain statements required to be included in termination notices, the omission of which is a defense to any unlawful detainer action. (OMC §§ 8.22.360(A) [change in ownership not listed as ground for recovering possession], 8.22.360(B)(2) [notice must indicate ground for recovering possession], 8.22.360(B)(6) [listing statements that must be included in notice].) Also, although not apparent on the face of the notice, the Pattersons were not owners of record at the time they served the termination notice and thus lacked capacity to serve the notice. (See OMC § 8.22.340 [defining "landlord" and "owner of record"]).

In short, the notice is invalid for a variety of reasons. Because the defects are apparent on the face of the notice, an unlawful detainer action based upon the invalid termination notice would have been subject to dismissal at the pleadings stage, either by demurrer or a motion for judgment on the pleadings.

Our conclusion that the notice is legally invalid does not mean it fails to qualify as protected activity. Under the first prong of the anti-SLAPP analysis, there is no "proof-of-validity" requirement. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 94.) Instead, "any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of [the second prong of the anti-SLAPP analysis] to provide a prima facie showing of the merits of the plaintiff's case.' [Citation.]" (*Ibid.*) Costa's view that a termination notice must be legally valid in order to qualify as protected activity " 'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.' [Citation.]" (*Ibid.*) The argument also "runs contrary to the legislative design. 'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous.' [Citations.]" (*Id.* at pp. 94-95.)

If Sneed or the Pattersons had proceeded to file an unlawful detainer action based on the invalid termination notice, there is no question the lawsuit would have qualified as protected activity under the first prong of the anti-SLAPP analysis, even though the lawsuit would have been subject to dismissal on the pleadings. In such a case, the scope of the protected activity extends to the notice, albeit invalid, upon which the lawsuit is based. The result should be no different simply because no lawsuit was ultimately filed, either because the landlord withdrew the notice or (as in this case) the tenant moved out in response to the notice. The service of a termination notice, when legally required as a precondition to filing a lawsuit, is an act taken in furtherance of the right to petition, regardless of whether a lawsuit is actually filed or the notice is legally defective.

We do not mean to suggest that any directive to a tenant by a landlord to vacate leased premises enjoys protection as activity in furtherance of the right to petition. (See *Marlin, supra,* 154 Cal.App.4th at p. 161 [termination of tenancy, by itself, is not protected activity].) Nevertheless, the termination notice in this case, while legally

defective, bears at least some indicia of a notice that is legally required as a predicate to an unlawful detainer action. Although the letter does not indicate the Pattersons would file suit if Costa failed to comply, it does describe the communication as a "30-day notice." Further, the letter was sent by certified mail, a form of delivery authorized for service of 30-day or 60-day notices to terminate. (See Civ. Code, §§ 1946, 1946.1, subd. (f).) For purposes of the first prong of the anti-SLAPP analysis, it is sufficient that the notice appears to have at least some connection to a potential lawsuit.[5] It is unnecessary at this initial stage of the analysis to assess whether litigation was contemplated in good faith and under serious consideration, an inquiry relevant to the question of whether a defendant can assert the litigation privilege (Civ. Code, § 47, subd. (b)) as an affirmative defense.[6] (See *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251; *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485 (*Feldman*); *Birkner, supra,* 156 Cal.App.4th at p. 284.)

Accordingly, we conclude the termination notice, while legally defective, nonetheless constituted protected activity under the anti-SLAPP statute.

b. *Illegal Activity*

Costa contends the Pattersons' termination notice was "patently illegal" under Oakland's Just Cause for Eviction Ordinance. She argues conduct that is illegal as a

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[5] "The first prong of the section 425.16 analysis is satisfied so long as the record does not show as a matter of law that [the defendant's] conduct had 'no "connection or logical relation" to an action and [was] not made "to achieve the objects" of any litigation.' [Citation]." (*Birkner, supra,* 156 Cal.App.4th at p. 284.)

[6] The trial court considered whether litigation was contemplated seriously and in good faith as part of its analysis under the first prong of the anti-SLAPP analysis. Sneed correctly points out that the question of whether her conduct was protected by the litigation privilege is irrelevant to a determination of whether she satisfied her burden under the first prong of the section 425.16 analysis. (See *Birkner, supra,* 156 Cal.App.4th at p. 284.) Although the trial court's reasoning may have been faulty, as a reviewing court we are concerned with whether the result was correct, irrespective of the court's reasoning. (*American Continental Ins. Co. v. American Casualty Co.* (2001) 86 Cal.App.4th 929, 936.)

matter of law is not constitutionally protected activity for purposes of the anti-SLAPP statute.

In *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 317, our Supreme Court recognized an exception to the anti-SLAPP statute for indisputably illegal conduct. Under this narrow exception, a defendant is precluded from relying upon the anti-SLAPP statute to strike a plaintiff's action if "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law . . . ." (*Id.* at p. 320.)

The limited exception to the anti-SLAPP statute for illegal conduct is inapplicable here. Sneed did not concede that her actions were illegal and, as we explain, the evidence does not *conclusively* establish that her actions were unlawful as a matter of law.

Oakland's Just Cause for Eviction Ordinance provides in relevant part that "[i]t shall be unlawful for a landlord . . . to endeavor to recover possession or to evict a tenant except as provided in [OMC § 8.22.360(A)]."[7] (OMC § 8.22.370(E).) Section 8.22.360(A) of Oakland's Municipal Code, in turn, provides that no landlord shall endeavor to recover possession unless the landlord is able to prove the existence of a "good cause" ground for eviction. Good cause grounds to evict a tenant include, among others, tenant's failure to pay rent, tenant's violation of a material term of the tenancy, tenant's use of the leased premises for an illegal purpose, owner's intent to use the leased premises as a principal residence, and removal of the leased premises from the rental market in accordance with terms of the Ellis Act (Gov. Code, § 7060 et seq.). (OMC § 8.22.360(A)(1), (2), (6), (8), (9) & (11).) A change in ownership does not constitute a valid ground to evict a tenant. Accordingly, under Oakland's Just Cause for Eviction Ordinance, it is illegal to evict a tenant solely because ownership of the leased premises changed hands.

[7] The ordinance does not specify the penalty for a violation. When no penalty is specified for a public offense, it is punishable as a misdemeanor. (Pen. Code, § 19.4.)

It is not illegal, however, to serve a defective termination notice upon a tenant. If the notice does not identify a proper ground for eviction, it is invalid and will not support an unlawful detainer action against the tenant. The landlord may also face civil penalties for noncompliance with Oakland's Just Cause for Eviction Ordinance. (See OMC § 8.22.370(B).) A landlord in such a case does not, however, face a criminal penalty as long as the landlord can prove the existence of a valid ground for evicting the tenant under OMC section 8.22.360(A).

Here, the termination notice served by the Pattersons was plainly invalid in that it failed to identify a proper ground for evicting Costa. (See OMC § 8.22.360(B)(2).) Merely because the notice was invalid for failure to identify a proper ground for eviction, however, does not establish the conduct was criminal. There may have existed a valid but unexpressed ground for eviction. For example, if the Pattersons had moved in to the premises as they indicated they might, their actions could have constituted a valid ground for evicting Costa. (See OMC § 8.22.360(A)(8) & (9) [listing owner move-in evictions as valid grounds for eviction under certain circumstances].) In such a case, although the eviction would still be unlawful because of the defective notice, Sneed and the Pattersons would have a defense to a criminal charge against them based on OMC section 8.22.370(E).

The evidence offered by Costa supports the conclusion there existed no valid ground for evicting her. In the initial termination notice, the only basis for eviction was the change in ownership. Although the Pattersons later indicated they planned to move in to the leased premises, Costa's evidence tended to show they did not move in but instead rented the premises to five young men.[8] Thus, Costa has established a prima facie case

[8] Although the declarations offered by Costa contain hearsay concerning who was renting the premises after Costa left, Sneed has waived the right to object to the use of hearsay by failing to object when the declarations were offered as evidence in the trial court. (See *Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1138, 1150.) With respect to the documents attached to Costa's judicial notice request, we disregard them except for the grant deed reflecting transfer of the leased premises on January 22, 2007. The grant deed is certified and reflects that it is an official county record. (Evid. Code,

that Sneed acted unlawfully in evicting her without a valid ground for doing so under Oakland's Just Cause for Eviction Ordinance. She has not *conclusively* established illegality, however, because Sneed or the Pattersons may be able to present evidence of a valid ground for eviction, or they may be able to controvert Costa's evidence tending to show the Pattersons did not move into the premises after she left.

Because the evidence does not conclusively establish the assertedly protected petitioning activity was illegal as a matter of law, the narrow exception from the anti-SLAPP statute for illegal conduct does not apply.

c. *"Arising from" Requirement*

Costa argues the causes of action in her complaint do not arise from service of the termination notice and thus do not seek to chill speech or petitioning activity. We agree.

In order to satisfy the first prong of the anti-SLAPP analysis, a defendant moving to dismiss a cause of action under the anti-SLAPP statute must prove the claim arises from acts taken in furtherance of the defendant's right of petition or free speech in connection with a public issue. (*Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1316-1317 (*Pearl Street*).) "Our Supreme Court has made it clear that a plaintiff's cause of action does not necessarily *arise from* a defendant's section 425.16 protected activity merely because the plaintiff's suit was filed *after* the defendant engaged in that activity. [Citation.]" (*Id.* at pp. 1317-1318.) " '[T]he defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]' [Citation.] A cause of action may be 'triggered by protected activity' without necessarily arising from such protected activity. [Citation]." (*Id.* at p. 1318, fn. omitted.)

In *Pearl Street*, the Santa Monica Rent Control Board (Board) filed a suit for declaratory and injunctive relief against property owners, alleging the owners were

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§ 1603.) The other documents submitted with the judicial notice request were the subject of a valid objection below on the ground the purported government records were not properly certified or authenticated. (See Evid. Code, §§ 1530-1532 [listing conditions for admissibility of public documents].)

violating state and local rent control laws relating to restoring a residential rental property to the market after having withdrawn it pursuant to the Ellis Act. (*Pearl Street, supra,* 109 Cal.App.4th at pp. 1311, 1313-1314.) The Board alleged the property owners were charging market rents for units that should have been no greater than the rent that would have been in effect had the unit not been withdrawn from the market. (*Id.* at p. 1314.) The owners filed a motion to strike, claiming the Board was attempting to punish them for filing paperwork with the Board to restore several units of the property to the rental market. (*Id.* at pp. 1315, 1318.) The appellate court held the owners had not met their threshold burden of showing the suit was based on protected activity. (*Id.* at p. 1318.) The court reasoned that while the "suit may have been 'triggered by' [the owners'] submission of such documents to the Board, it is *not* true that this suit is *based on* the filing of such papers. Rather, the suit is based on activity that preceded the filing of the papers. *This suit is based on the Board's claim that [the owners]are charging an illegal rent for units A and C.* Not surprisingly, [the owners] have not presented any authority for the proposition that their conduct in charging illegal rent is an act in furtherance of their rights of petition or free speech." (*Ibid.*) The court concluded: "If we were to accept [the owners'] arguments, then they could preclude any judicial review of their violation of the rent control law, no matter how egregious, by simply filing a SLAPP motion in response to any Board complaint. We are confident that the Legislature intended no such application of this statute." (*Id.* at p. 1318.)

The decisions in *Marlin, supra,* 154 Cal.App.4th 154, and *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281 (*Clark*), are similarly instructive. In *Marlin*, the defendant property owners gave notice they intended to permanently remove rental units from the market pursuant to the Ellis Act. (*Marlin, supra,* 154 Cal.App.4th at p. 157.) After the renters filed an action seeking a declaration of their rights under the Ellis Act, the defendants responded with an anti-SLAPP motion, claiming the complaint arose from the act of filing and serving the Ellis Act notices. (*Id.* at pp. 157-158.) The appellate court concluded the defendants had not met their burden under the first prong of the anti-SLAPP analysis, reasoning that the renters' suit was "not based on defendants' filing and

serving of a notice required under the Ellis Act, it is based on the [renters'] contention 'defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home.' " (*Id.* at pp. 161-162.)

In *Clark, supra*, 170 Cal.App.4th at p. 1284, "[a] landlord successfully evicted a long-term tenant from a rent-controlled apartment, ostensibly to free the unit for occupancy by the landlord's daughter. The landlord's daughter never moved in, and the tenant sued the landlord for fraud and unlawful eviction, and failure to pay relocation expenses." (*Ibid.*) The landlord filed an anti-SLAPP motion, contending the tenant's complaint arose from protected activity. (*Ibid.*) The Court of Appeal disagreed, concluding that the tenant's lawsuit was "not premised on [the landlord's] protected activities of initiating or prosecuting the unlawful detainer action, but on her removal of the apartment from the rental market and fraudulent eviction of [the tenant] for the purpose of installing a family member who never moved in." (*Id.* at p. 1286.)

Just as in *Pearl Street*, *Marlin*, and *Clark*, the lawsuit here does not arise from protected petitioning activity that preceded the filing of the action. " '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' " (*Marlin, supra,* 154 Cal.App.4th at p. 160, fn. omitted.) Instead, the gravamen of the complaint here is that Sneed unlawfully sought to triple Costa's rent by fraudulently advising her the tenancy had been terminated by a sale of the premises. Costa further alleges the Pattersons had no good faith intent to occupy the premises as their principal residence. The termination notice may have been evidence of the alleged scheme, and it may have triggered the lawsuit, but it was not the basis for the action. Tripling the rent in violation of the law is not a protected activity.

Sneed failed to cite, much less distinguish, the holdings in *Pearl Street* and *Marlin*.[9] She relies on *Feldman, supra,* 160 Cal.App.4th 1467, and *Birkner, supra,* 156 Cal.App.4th 275, for the proposition that service of a termination notice is protected

[9] The decision in *Clark* was filed after the briefing had been completed in this appeal.

activity under the anti-SLAPP statute. However, it is undisputed that service of a termination notice is protected under the anti-SLAPP statute; the critical inquiry is whether the lawsuit a defendant seeks to dismiss under the anti-SLAPP statute *arises* from that protected activity. Sneed does not explain how it is that Costa's complaint arises from protected activity.

Furthermore, *Birkner* and *Feldman* are inapposite. In *Birkner*, a landlord who was sued for wrongful eviction, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress had rescinded an eviction notice before filing an unlawful detainer action. (*Birkner, supra,* 156 Cal.App.4th at pp. 278-280.) The tenants were not evicted but sued nonetheless based merely on the landlord's filing, service, and initial refusal to rescind the notice. In that case, the " 'sole basis for liability' " was the service of the notice. (*Id.* at p. 283.) In *Feldman,* the tenants refused to vacate after the landlord demanded higher rent. (*Feldman, supra,* 160 Cal.App.4th at pp. 1473-1474.) The landlord ultimately filed an unlawful detainer action but dismissed it after the tenants vacated the premises. (*Id.* at p. 1475.) The court found that the tenants' cross-complaint against the landlord, with the exception of a negligence claim, was based on the filing of the notice to quit and statements made by the landlord's agent in connection with the threatened unlawful detainer. (*Id.* at p. 1484.) According to the court, "[t]hese activities are not merely cited as *evidence* of wrongdoing or activities 'triggering' the filing of an action that arises out of some other independent activity. These *are* the challenged activities and the bases" for all but one cause of action. (*Id.* at p. 1483.)

In this case, by contrast, the causes of action in Costa's complaint do not arise from mere service of the termination notice. Sneed's alleged unlawful attempt to triple Costa's rent is independent of any protected activity in which she may have engaged. As a consequence, Sneed has not met her burden of showing the lawsuit is based on protected activity. We therefore need not consider whether Sneed has demonstrated she is likely to succeed on the merits.

DISPOSITION

The February 27, 2008, order denying Sneed's anti-SLAPP motion is affirmed. Costa shall recover her costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.